No. 17-1174

In the Supreme Court of the United States

LUIS A. NIEVES AND BRYCE L. WEIGHT,
Petitioners,

v.

RUSSELL P. BARTLETT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court held that probable cause defeats a First Amendment retaliatory prosecution claim under 42 U.S.C. § 1983 as a matter of law. Does probable cause likewise defeat a First Amendment retaliatory arrest claim under § 1983?

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BRIEF FOR PETITIONER

Petitioners Luis Nieves and Bryce Weight respectfully request that this Court reverse the decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The memorandum opinion and order of the court of appeals (Pet. App. 1-6) is reported at 712 Fed. App'x 613. The opinion of the district court (Pet. App. 7-39) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 2017. Pet. App. 1. A petition for rehearing was denied on November 21, 2017. Pet. App. 40. Petitioners filed their petition for certiorari on February 16, 2018, and this Court granted it on June 28, 2018. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Petitioners Luis A. Nieves and Bryce L. Weight, Alaska state troopers, arrested respondent Russell P. Bartlett for disorderly conduct at a remote outdoor festival. J.A. 11. Bartlett later sued the troopers under 42 U.S.C. § 1983, claiming that his arrest was unlawful because, among other things, it was retaliation for speech protected by the First Amendment. J.A. 34-35. The district court found there was probable cause for the arrest and dismissed all of Bartlett's claims on summary judgment. Pet. App. 22, 37, 39. Yet the Ninth Circuit reversed dismissal of the retaliation claim, holding that the existence of probable cause for an arrest does not preclude a retaliatory arrest claim under § 1983. Pet. App. 5-6. This case asks the Court to decide whether the Ninth Circuit's rule—that the absence of probable cause is not an essential element of a retaliatory arrest claim—is wrong.

1. In the remote Hoodoo Mountains of Interior Alaska, thousands of winter-sport enthusiasts gather each spring for Arctic Man, a multi-day "booze and

fossil-fueled" festival "bookended around the world's craziest ski race." Matt White, *Arctic Man: Wild Rides and Crazed Nights at America's Most Extreme Ski Race*, SBNation, July 23, 2014, http://www.sbnation.com/longform/2014/7/23/5923357/. The event is famous for both the extreme snowmobile-assisted ski race that is its main event and the extreme alcohol consumption that surrounds it. White, *supra*; J.A. 163-65.

With upwards of 10,000 people gathering to party at a remote campsite miles from any significant infrastructure, Arctic Man presents a unique challenge for law enforcement. The State of Alaska's Department of Public Safety flies in troopers from all over Alaska to police the event. J.A. 163. Troopers are housed at a U.S. Army cold-weather testing site roughly thirty miles away. J.A. 163. Manpower is limited. Even during peak times of concern, the troopers are able to field only six to eight officers per shift. J.A. 165. In addition to conducting search-and-rescue operations and responding to snowmobile crashes and injured riders, troopers spend much of their time working to mitigate the risks to partiers associated with high levels of intoxication and sub-freezing temperatures—including sexual assault and hypothermia. J.A. 164-65.

Given the challenging conditions and limited number of officers, the troopers follow specific protocols to help keep partiers and themselves safe. Troopers are encouraged to address safety concerns proactively. J.A. 140, 164. To create the appearance of greater numbers, troopers conduct many patrols and strive to be highly visible. J.A. 165. And given the danger posed by extremely intoxicated partiers, officers are encouraged

to pair up when possible and are mandated not to enter the beer tent—the "scene of passouts and hookups, blackouts and beatdowns"—alone. J.A. 140, 163; White, *supra*.

2. Bartlett was arrested on the last night of Arctic Man 2014. Pet. App. 8. Although the arrest was captured on video, the parties dispute certain details about the charged encounter, including exactly what was said and how it was said. And as is common in cases where liability turns on subjective intent, the parties offer very different "interpretations of each other's conduct," as even aspects of the video are "indeed susceptible to more than one interpretation." Pet. App. 8, 11.

On the evening the arrest occurred, Sergeant Luis Nieves was on duty as the supervising trooper. Pet. App. 8; J.A. 140. A local news reporter who had obtained permission to shadow Sgt. Nieves at Arctic Man captured some of the night's events on his video camera. J.A. 70. At around 1:30 in the morning, Sgt. Nieves arrived at the scene of a large outdoor party to investigate underage alcohol consumption (not a trivial concern—at a previous year's Arctic Man, troopers found an underage drinker lying unconscious in a snow berm). Pet. App. 8; J.A. 140-41, 145, 164-65.

Sgt. Nieves noticed a beer keg outside of an RV at the party, and he approached the RV to ask the owner to place the keg inside. J.A. 141, 406. According to Sgt. Nieves's incident report, when he approached the RV a nearby partier, later identified as Bartlett, began shouting at the RV owners not to speak with Sgt. Nieves or let him inside. J.A. 152. Sgt. Nieves testified that after asking the RV owners to secure the keg, he

attempted to explain to Bartlett that he was investigating underage drinking, but Bartlett yelled at him, said he did not want to speak with him, and told him to leave. J.A. 187-88. Based on this brief interaction, Sgt. Nieves believed that Bartlett was "highly intoxicated" and unreasonable. J.A. 188. To defuse the situation, Sgt. Nieves chose not to engage Bartlett further; the sergeant instead left the RV and began walking back toward his patrol vehicle. J.A. 188.

Bartlett disputes this account, insisting that he did not initiate the conversation with Sgt. Nieves or yell at the trooper or the RV owners. J.A. 363-67. Instead, Bartlett testified that Sgt. Nieves approached him near the RV, tapped him on the shoulder, and asked to speak to him. J.A. 362-63. According to Bartlett, when he asked Sgt. Nieves why he wanted to speak with him, Sgt. Nieves's demeanor changed from "kind of just normal" to "more aggressive." J.A. 363-64. Bartlett testified that he told Sgt. Nieves that he did not want to talk to him and asked if he was free to go, and Sgt. Nieves turned and walked away. J.A. 364.

Shortly after that encounter, Bartlett noticed another trooper, Bryce Weight, speaking with a teenager at the edge of the crowd; Trooper Weight was attempting to determine whether the teen had been drinking alcohol. J.A. 150, 368-69. Trooper Weight reported that while he was speaking with the teen, Bartlett approached him aggressively, looking angry. J.A. 150. According to Trooper Weight, Bartlett put his arm between the trooper and the minor and insisted that Trooper Weight "had no business talking with the juvenile." J.A. 150. Trooper Weight observed that Bartlett smelled strongly of alcohol. J.A. 150-51.

Bartlett's friend David Krack, who later testified on Bartlett's behalf, admitted that both he and Bartlett were intoxicated at the time—indeed, too intoxicated to drive. J.A. 206-07.

Meanwhile, Sgt. Nieves saw Bartlett charging toward Trooper Weight and feared that Bartlett "was taking a fight to a lone trooper." J.A. 141. Sgt. Nieves rushed to assist Trooper Weight. J.A. 141.

Although Trooper Weight attempted to explain to Bartlett that he was investigating underage drinking, Bartlett remained hostile and aggressive. J.A. 150. Trooper Weight later testified that Bartlett "was talking over [him] [and] interrupting [him]." J.A. 172. Trooper Weight believed that Bartlett "was not going to . . . allow [him] to conduct [his] investigation." J.A. 157.

According to Trooper Weight, Bartlett then "put his hands very close to [Trooper Weight's] face, pointing" and moved forward so that his chest was nearly touching Weight's. J.A. 151, 157. Feeling threatened due to Bartlett's proximity, hostility, and intoxication, Trooper Weight placed his hands on Bartlett's chest and used an open-palm push (a technique taught in police training) to move Bartlett back and create space between them. J.A. 151, 157, 225.

Sgt. Nieves reached Trooper Weight just as Weight pushed Bartlett away. J.A. 141. Believing that Bartlett was "harassing or threatening Trooper Weight and that Trooper Weight considered Bartlett to be a threat," Sgt. Nieves decided to arrest Bartlett. J.A. 141-42.

Sgt. Nieves grasped Bartlett's left arm and repeatedly ordered Bartlett to back up and get on the

ground; Trooper Weight grabbed Bartlett's right arm. J.A. 142; Resp. App. Disk 1. When Bartlett did not comply and instead tensed his arms against the troopers, Trooper Weight performed a "leg sweep" that caused Bartlett to fall to his hands and knees. J.A. 151, 225-26. Video footage shows Bartlett straining to arch his head and neck against the downward pressure being applied by Trooper Weight, who was trying to bring him to the ground. Resp. App. Disk 1.

Bartlett did not cease resisting until Sgt. Nieves threatened to use a taser, at which point Bartlett went prone and placed his hands behind his back. J.A. 151. The troopers handcuffed Bartlett. J.A. 151. Sgt. Nieves then placed Bartlett in the trooper vehicle. Resp. App. Disk 1. The troopers took Bartlett to the holding tent and charged him with disorderly conduct and resisting arrest. J.A. 151. They released him a few hours later without injury. J.A. 212, 220-21.

Bartlett disputes aspects of the troopers' account of the arrest. Bartlett testified that he stood close to Trooper Weight in order to communicate over the party's loud music and did not believe he could have been viewed as threatening. J.A. 429-30. According to Bartlett, he complied with the troopers' subsequent orders to get down but went to the ground slowly because he was initially shocked, and because he did not wish to aggravate a back injury. J.A. 371-72, 375.

Looking at the video of the arrest, the district court found certain facts to be "indisputable." Pet. App. 11. The court found that "Trooper Weight, Mr. Bartlett, and the minor [were] standing very close together exchanging words" at the party. Pet. App. 11. The video confirmed that "at the time of the push, Mr. Bartlett's

right hand was roughly at shoulder height within inches of Trooper Weight's face." Pet. App. 12. The video also established that after Sgt. Nieves grabbed Bartlett's left arm, "Mr. Bartlett's right arm [swung] back, extended, then [came] forward as Trooper Nieves maneuver[ed] behind Mr. Bartlett." Pet. App. 12. The court found that after Trooper Weight executed the leg sweep, Bartlett went "down on his hands and knees as the troopers continue[d] to try to get him all the way to the ground" and that he "appear[ed] to submit to the takedown" only after Sgt. Nieves "[told] him he [was] going to 'get tased.' " Pet. App. 12.

After Bartlett's arrest, he and Sgt. Nieves exchanged words near the trooper vehicle. Bartlett testified to the following version of that exchange:

> Nieves: You're going to jail.
> Bartlett: For what?
> Nieves: For harassing my trooper.
> Bartlett: I was not harassing your trooper.
> Nieves: You could have walked away.
> Bartlett: I want your commanding officer right now.
> Nieves: I am the commanding officer. I'm the sergeant in charge.
> [Nieves puts Bartlett in the trooper vehicle]
> Nieves: Bet you wish you would have talked to me now.
> Bartlett: What are you talking—that's ridiculous. And why am I being arrested?
> Nieves: You're done.
> Bartlett: No, I'm not done.
> [Nieves closes the car door.]

J.A. 376-77. Audio obtained from another trooper on scene recorded the exchange between Bartlett and Sgt. Nieves. The recorded conversation is significantly longer than the interaction recounted by Bartlett; the recording includes Bartlett directing profanity at Sgt. Nieves, protesting his innocence, and stating that the trooper is "being ridiculous" and "totally uncompliant." J.A. 494-500. Nowhere during the exchange can Sgt. Nieves be heard making a statement resembling "Bet you wish you would have talked to me now." J.A. 494-500. In his response to the troopers' request for admissions, Bartlett admitted that the audio contains no such statement. Dist. Ct. Dkt. 62-4 at 2. Nor did any other witness testify to hearing Sgt. Nieves make a statement to that effect before, during, or after the arrest.

The prosecutor assigned to the case accepted the charges against Bartlett for prosecution. J.A. 243. The prosecutor was unable to pursue the case to trial, however, because his agency's budget did not permit him to travel to the rural court where the trial would have been conducted. J.A. 245. Because of these budgetary constraints, the State ultimately dismissed the case against Bartlett. J.A. 245.

3. After Bartlett's criminal case was dismissed, Bartlett sued Trooper Weight and Sgt. Nieves, asserting claims of false arrest and false imprisonment, excessive force, malicious prosecution, retaliatory arrest, and violations of due process and equal protection under 42 U.S.C. § 1983, as well as conspiracy under 42 U.S.C. § 1985. Pet. App. 15. After extensive discovery, the district court granted

summary judgment in favor of the troopers on all claims. Pet. App. 39.

On the false arrest and imprisonment claims, the court ruled that, even viewing all facts and inferences in the light most favorable to Bartlett, there was probable cause to arrest him. Pet. App. 22. The court concluded that "[p]articularly given the troopers' heightened challenges . . . at a crowded, large, remote event like Arctic Man, a reasonable officer could interpret a loud person acting as depicted in the videos as having committed harassment." Pet. App. 21-22. Even if Bartlett "did not intend to threaten Trooper Weight," a reasonable officer could interpret Bartlett's hand movements near Trooper Weight's face as a "challenge or taunt"—the actus reus of harassment under Alaska law.[1] Pet. App. 21-22. The court therefore concluded that Bartlett's version of the incident, combined with the video, established probable cause for the arrest. Pet. App. 21-22.

The court also found that even if there was not probable cause to arrest Bartlett for harassment, the existence of probable cause was at least reasonably arguable—in other words, clearly established law did not prohibit the troopers from arresting Bartlett based on his conduct. Pet. App. 22. The court therefore concluded that the troopers were entitled to qualified

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[1] A person commits harassment under Alaska Statute 11.61.120(a)(1) "if, with intent to harass or annoy another person, that person . . . insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response. . . ."

immunity on Bartlett's false arrest and false imprisonment claims.[2] Pet. App. 22-23.

The court ruled that the existence of probable cause to arrest Bartlett for harassment also barred his First Amendment retaliatory arrest claim. Pet. App. 37. This claim rested on the theory that Sgt. Nieves was "riled by Bartlett's earlier refusal to engage him in conversation," J.A. 257, which "rubbed Nieves the wrong way and was a significant factor in Nieves [sic] decision" to arrest Bartlett. J.A. 262. And Bartlett opined that Trooper Weight took umbrage at Bartlett's "challenge to his authority"—which Bartlett characterized as "merely expressing his belief that Weight had no right to question [the teenager] absent parental consent"—prompting him to arrest in retaliation for this perceived affront. J.A. 270, 299. The court did not assess the viability of Bartlett's theory of retaliation, but instead concluded that this Court "has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause." Pet. App. 36 (quoting *Reichle v. Howards*, 566 U.S. 658, 664-65 (2012)). Given the existence of probable cause for the arrest, the court held that the troopers were entitled to summary judgment on Bartlett's retaliatory arrest claim.

Finding no merit in any of Bartlett's claims, the district court entered summary judgment in the troopers' favor on all counts and dismissed the case with prejudice. Pet. App. 39.

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[2] Having determined the officers had probable cause to arrest Bartlett for harassment, the district court did not rule on whether they also had probable cause to arrest him for disorderly conduct, resisting arrest, or assault. Pet. App. 22 n.72.

4. Bartlett appealed the district court's decision to the Court of Appeals for the Ninth Circuit. Pet. App. 2. On appeal he reprised his argument that Sgt. Nieves and Trooper Weight arrested him "in retaliation for his earlier refusal to speak with Nieves and his later decision to question Weight's authority." Ct. App. Dkt. 7 at 35.

Concluding that there was "at least arguable probable cause" to arrest Bartlett for harassment, assault, disorderly conduct, and resisting arrest, the court of appeals affirmed summary judgment on Bartlett's false arrest claim on the ground of qualified immunity. Pet. App. 2-3. The court also relied on qualified immunity to affirm summary judgment on Bartlett's excessive force claim, noting that it was aware of no existing case in which an officer in similar circumstances was held to have violated the Fourth Amendment. Pet. App. 4. And because Bartlett had not shown an absence of probable cause for his arrest, the court affirmed summary judgment on his malicious prosecution claim. Pet. App. 4.

But despite concluding that the troopers had probable cause to arrest Bartlett for assault, disorderly conduct, harassment, and resisting arrest, the court of appeals reversed summary judgment on Bartlett's retaliatory arrest claim. Pet. App. 4. The court relied on its earlier holding in *Ford v. City of Yakima*, 706 F.3d 1188, 1196 (9th Cir. 2013), that a plaintiff may prevail on a claim of retaliatory arrest "even if the officers had probable cause to arrest." Pet. App. 4-5. The court therefore held that the existence of probable cause to arrest Bartlett did not, on its own, defeat his retaliatory arrest claim. Pet. App. 4-6.

Pointing to Bartlett's allegation—uncorroborated by any other witness testimony, audio recording, or video footage—that Sgt. Nieves said after the arrest, "Bet you wish you would have talked to me now," the court ruled that a jury might be persuaded that Bartlett was arrested for his earlier refusal to assist with the investigation, rather than for his conduct towards Trooper Weight. Pet. App. 6, 10-12, 36-37. And although the court did not identify any specific evidence suggesting retaliatory motive on Trooper Weight's part, it reversed the grant of summary judgment as to both troopers on the retaliatory arrest claim and remanded for trial. Pet. App. 6.

SUMMARY OF ARGUMENT

This case requires the Court to decide the "elements of the tort" for a First Amendment retaliatory arrest claim in a damages action under 42 U.S.C. § 1983. The sources of authority that guide this inquiry—the Court's own precedents, the common law, and the values of the First Amendment—dictate that a plaintiff must plead and prove the absence of probable cause for the arrest.

I.A. The Court's closest precedent, *Hartman v. Moore*, 547 U.S. 250 (2006), supports a probable cause element for retaliatory arrest claims. In *Hartman* the Court ruled that a plaintiff seeking damages for retaliatory prosecution must plead and prove the absence of probable cause in order to recover. *Id.* at 265-66. This requirement rests on two "details specific to" retaliatory prosecution claims: first, "[t]he requisite causation . . . is usually more complex than it is in other retaliation cases"; second, the presence or absence of probable cause "will always" provide "a

distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation." *Id.* at 261. The same two features exist in retaliatory arrest claims. Retaliatory arrest claims present complex questions of causation. It is often difficult to discern whether an officer considered the suspect's speech for legitimate reasons—*e.g.* as evidence of a threat—or illegitimate ones. The charged circumstances of many arrests and the "split-second decisions" officers are forced to make compound that difficulty. *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1953 (2018). And just as with retaliatory prosecution claims, probable cause has "high probative force" on the difficult question of causation. *Hartman*, 547 U.S. at 265. Making absence of probable cause an element of retaliatory arrest claims thus "makes sense" for the same reasons it does in retaliatory prosecution claims. *Id.* at 265-66.

B. A probable cause element for retaliatory arrest claims is also consistent with the Court's preference for objective tests to govern police conduct and has the benefits that such objective standards offer. Suspects often engage in protected speech "in connection with, or contemporaneously to, criminal activity," *Lozman*, 138 S. Ct. at 1953, often criticizing, challenging, or even just insulting police officers. If an officer knows that her actions will be judged in light of objective facts—rather than a jury's guess as to how she felt about the suspect's speech—she will not hesitate to make reasonable arrests necessary for public safety and order. But if retaliatory arrest claims do not have a probable cause element and instead turn solely on the officer's subjective intent, then officers will be vulnerable to "dubious retaliatory arrest suits" and the

burdens they impose. *Id.* The "powerful evidentiary significance" of probable cause, *Hartman*, 547 U.S. at 261, makes it a reliable tool for distinguishing lawful arrests from unlawful ones without the costs of a purely subjective inquiry.

II. The common law of torts—which the Court looks to when identifying the elements of a cause of action under § 1983, *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 920 (2017)—further supports a probable cause element for retaliatory arrest claims. For the most analogous common law torts—malicious prosecution, malicious arrest, and false imprisonment—probable cause has long been a defense to liability, even when improper motive is alleged. This rule reflected courts' concern that peace officers would be reluctant to enforce the law for fear of lawsuits putting their motives on trial. Given Congress's intent that § 1983 "be construed in the light of common law principles that were well settled at the time of its enactment," *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997), the Court should construe a § 1983 claim of retaliatory arrest to include a probable cause element.

III. Finally, a probable cause element that permits recovery for the arrests most likely caused by retaliatory animus while filtering out those that are not is consistent with the purposes and values of the First Amendment. When high-level officials direct the use of the government's arrest power in a retaliatory attempt to suppress speech "high in the hierarchy of First Amendment values," then there is a "compelling need" for redress via damages action under § 1983. *Lozman*, 138 S. Ct. at 1954-55. But "ad hoc, on-the-spot" arrest decisions made by individual officers, *id.* at

1954, are not a potent tool for suppressing core First Amendment speech, and improper arrests can be deterred and corrected in other ways. A probable cause element that reliably sorts meritorious from meritless claims justly protects the values of the First Amendment.

ARGUMENT

To maintain a damages claim for retaliatory arrest in violation of the First Amendment, a plaintiff must plead and prove the absence of probable cause for the arrest.

"The First Amendment prohibits government officials from retaliating against a person for having exercised the right to free speech." *Lozman v. City of Riviera Beach, Fla*, 138 S. Ct. 1945, 1949 (2018) (citing *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998)). Yet identifying an alleged constitutional violation is "only the threshold inquiry" in a damages action under 42 U.S.C. § 1983, which "creates a 'species of tort liability' " for violation of federal rights. *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 916, 920 (2017). The Court "must still determine the elements of, and rules associated with an action seeking damages" for the alleged violation. *Id.* (citing *Carey v. Piphus*, 435 U.S. 247, 257-58 (1978)). To do so, the Court looks to both its own precedent, *Lozman*, 138 S. Ct. at 1952, and the common law, "attend[ing] to the values and purposes of the constitutional right at issue," *Manuel*, 137. S. Ct. at 921. These sources of authority require that a plaintiff pursuing a § 1983 damages claim of retaliatory arrest against individual officers plead and prove that the officers lacked probable cause to make the arrest.

I. The Court's precedents support a probable cause element for § 1983 retaliatory arrest claims.

The Court's closest precedents support imposing a probable cause element in retaliatory arrest suits against individual officers. Requiring proof that probable cause was lacking addresses the particular "complexity of proving (or disproving) causation in these cases," filtering strong cases from weak while protecting society's interest in effective law enforcement against "dubious retaliatory arrest suits," *Lozman*, 138 S. Ct. at 1953, 1954.

"[T]wo major precedents" govern First Amendment retaliation claims. *Id.* at 1952. The first, *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), held that to prevail on a retaliation claim, a plaintiff must show that his protected speech was the "but-for" cause of the allegedly retaliatory government action. *Mount Healthy* involved a public school teacher's claim that the school district declined to renew his contract in retaliation for his criticizing school district policies on a local radio station. *Id.* at 281-82. The school district was found liable for damages because the teacher's speech on a matter of public concern "played a substantial part" in the district's decision not to rehire him, even though there were other legitimate grounds for the decision. *Id.* at 284. But this Court reversed, ruling that the proper test for causation in a retaliation case is whether the employer "would have reached the same decision . . . even in the absence of protected conduct." *Id.* at 287.

In the other major decision, *Hartman v. Moore*, 547 U.S. 250 (2006), the Court decided that a plaintiff pursuing a specific type of First Amendment retaliation claim—retaliatory prosecution—must show more than just but-for causation. *Id.* at 265-66. At issue in *Hartman* was a businessman's claim that U.S. Postal Service inspectors persuaded federal prosecutors to bring criminal charges against him in retaliation for his lobbying Congress to change the Postal Service's policies. *Id.* at 252-54. The Court ruled that a plaintiff pursuing a retaliatory prosecution claim must plead and prove the absence of probable cause to bring the criminal charges. *Id.* at 265-66.[3] Absence of probable cause is an essential element of retaliatory prosecution claims because its "high probative force" can overcome the difficulty of establishing causation, which is "usually more complex than it is in other retaliation claims." *Id.* at 261, 265.

Given the "close relationship between retaliatory arrest and prosecution claims," *Reichle v. Howards*, 566 U.S. 658, 667 (2012), the Court has twice faced the question "whether in a retaliatory arrest case the *Hartman* approach should apply, thus barring a suit where probable cause exists, or, on the other hand, the inquiry should be governed only by *Mt. Healthy*." *Lozman*, 138 S. Ct. at 1954; *Reichle*, 566 U.S. at 670 (ruling that right to be free from arrest supported by probable cause but resulting from retaliatory motive

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[3] Although the claim in *Hartman* was brought against federal officials under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), the Court's analysis applies equally to claims under § 1983. *See Hartman*, 547 U.S. at 259 (describing the causation standards for "a *Bivens* (or § 1983) plaintiff" alleging First Amendment retaliation).

was not "clearly established" and granting qualified immunity to arresting officers). This past term, in *Lozman v. City of Riviera Beach, Florida*, 138 S. Ct. 1945, the Court declined to answer that question broadly and instead ruled only on the "unique class of retaliatory arrest claims" presented by the facts of that case: claims involving an arrest stemming from an alleged municipal policy of retaliation. *Id.* at 1954. For this subset of retaliatory arrest claims, the Court ruled that *Mt. Healthy* is the correct standard. *Id.* at 1955.

Yet for the "mine run of arrests made by police officers," *id.* at 1954, *Hartman* is the better rule. In everyday arrests, particularly those "when speech is made in connection with, or contemporaneously to, criminal activity," it is far more difficult to establish whether retaliatory animus caused an arrest than in ordinary retaliation cases. *Lozman*, 138 S. Ct. at 1953-54. The existence or absence of probable cause has "high probative force" on that difficult question, so "it makes sense to require" a showing of no probable cause "as an element of a plaintiff's case." *Hartman*, 547 U.S. at 265-66. Doing so would also be consistent with the Court's preference for objective tests in judging police officers' conduct, which promote evenhanded law enforcement, protect officers from frivolous litigation, and provide courts with consistent and reliable standards by which to judge officers' conduct.

A. The logic of *Hartman*'s probable cause element for retaliatory prosecution claims applies to retaliatory arrest claims.

The two distinct features of retaliatory prosecution claims that led the Court in *Hartman* to make the absence of probable cause an "element[] of the tort" also exist in retaliatory arrest claims. *Hartman*, 547 U.S. at 265. The complexity of determining causation, and the "powerful evidentiary significance" of probable cause in that determination, *Id.* at 261, both justify requiring the same probable cause element for these claims.

The Court in *Hartman* made showing an absence of probable cause an "element[] of the tort" of retaliatory prosecution because proving causation is more difficult than in "ordinary retaliation claims." *Id.* at 259, 265. In retaliatory prosecution claims, that complexity is a function of the prosecutor's special status. Because prosecutors have absolute immunity from suit, a retaliatory prosecution claim targets the investigators on the theory that their retaliatory animus caused the prosecutor to bring charges. *Id.* at 262 (citing *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976)). Thus to prevail, a plaintiff must establish a causal connection "between the retaliatory animus of one person and the action of another" that overcomes the presumption that the prosecutor had legitimate grounds to bring the charges. *Id.* at 262-63.

"The connection, to be alleged and shown, is the absence of probable cause." *Id.* at 263, 265. As the Court explained, the absence of probable cause "will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the

prosecution," while the existence of probable cause "will suggest that prosecution would have occurred even without a retaliatory motive." *Id.* at 261. The Court thus concluded that "[b]ecause showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case." *Id.* at 265-66.

In *Lozman* the Court recognized the "undoubted force" in the argument that "just as probable cause is a bar in retaliatory prosecution cases, so too should it be a bar" against claims of retaliatory arrest against individual arresting officers. 138 S. Ct. at 1953. But that case presented a unique retaliatory arrest claim because the plaintiff alleged that his arrest stemmed from an official municipal policy of intimidation in retaliation for his protected speech. The Court reasoned that in the specific subset of retaliatory arrest claims like that one—alleging an "official policy [of] retaliation for prior, protected speech bearing little relation to the criminal offense"—the "causation problem" is "not of the same difficulty" as in the typical retaliatory arrest case. *Id.* at 1954. The Court relied on this distinction to conclude that the *Mt. Healthy* framework is appropriate for the "unique class" of retaliatory arrest claims involving allegations of an official retaliatory policy while declining to address the elements of a retaliatory arrest claim "in other contexts." *Id.* at 1955.

1. Retaliation claims arising out of the typical arrest pose substantial causal complexity that justifies a probable cause element like the one adopted in *Hartman*. Like retaliatory prosecution claims, typical "retaliatory arrest cases . . . present a tenuous causal

connection between the defendant's alleged animus and the plaintiff's injury." *Reichle*, 566 U.S. at 668.

In some arrests, determining causation will be difficult for the same reason it is in retaliatory prosecution claims: establishing a connection "between the retaliatory animus of one person and the action of another." *Hartman*, 547 U.S. at 262. Arrests often involve more than one officer. So even if there is evidence of retaliatory animus for one officer, the factfinder must figure out the role that animus might have played in the other's decision to arrest. That problem exists here. Bartlett advances distinct theories of retaliatory animus against each officer, stemming from separate encounters. Sgt. Nieves, he maintains, was motivated by Bartlett's earlier unwillingness to speak with him. J.A. 257, 262. Trooper Weight, on the other hand, was allegedly motivated by Bartlett's later speech challenging his authority. J.A. 270, 299. If the jury finds retaliatory animus only on the part of Trooper Weight, then it must determine not only whether it was the but-for cause of the push, but also what role the push played in the decision to arrest. Would Sgt. Nieves have decided to arrest Bartlett had he not seen a fellow trooper push him away? Conversely, if the jury finds that only Sgt. Nieves was motivated by animus, it will have to decide whether Trooper Weight would have followed up the push with an arrest had Sgt. Nieves not been there to take the lead in corralling Bartlett. Disentangling the different theories of motive and causation will be a difficult task for the factfinder.

In other arrests, causal complexity exists for another reason: speech often plays a legitimate role in an officer's decision whether to arrest someone. "[T]he connection between alleged animus and injury may be weakened in the arrest context by a police officer's wholly legitimate consideration of speech." *Id.* Unlike most "ordinary" retaliation claims, where the defendant must show that his reasons for demoting an employee or declining to renew a contract are entirely separate from the plaintiff's speech, in retaliatory arrest claims the plaintiff's speech will often be a legitimate factor in the decision to arrest.

This case perfectly illustrates how "[t]he content of the suspect's speech might be a consideration in circumstances where the officer must decide whether the suspect . . . may present a continuing threat." *Lozman*, 138 S. Ct. at 1953. Bartlett's speech, combined with his conduct, could reasonably lead an officer to believe that Bartlett intended to prevent the officers from doing their jobs—by force if necessary. Trooper Weight testified that Bartlett commanded him to "get out of here" and insisted that Weight not speak to the teen. J.A. 172. Bartlett's responses showed unwillingness to accept Trooper Weight's explanation of what he was doing: "He was very adamant and it was obvious to me that it didn't matter what I had to say." J.A. 172. Sgt. Nieves explained how his earlier interaction with Bartlett—in which Bartlett began "yelling . . . I don't want to talk to you . . . you need to get out of here if you're done"—informed his judgment that Bartlett was aggressive and unreasonable when confronting Trooper Weight. J.A. 142, 188. Officers can reasonably rely on a person's expressions of hostility and challenges to authority, when combined with

agitation and aggressive physical posture, to conclude that the person "pose[s] an immediate threat." *Reichle*, 566 U.S. at 672 (Ginsburg, J., concurring). This sort of rational assessment "should not expose [officers] to claims for civil damages." *Id.* Yet it is easy for a plaintiff to allege it was the officer's affront at being challenged—not his perception of threat—that motivated the arrest. And it is difficult for a factfinder "to discern whether an arrest was caused by the officer's legitimate or illegitimate consideration of speech." *Lozman*, 138 S. Ct. 1953 (citing *Reichle*, 566 U.S. at 688).

The content of a suspect's speech can legitimately support an officer's decision to arrest for a variety of other reasons too, even as the circumstances will often raise a speculative but plausible inference of retaliation:

- Speech can warn of a risk of danger to the public. *Cf. Kilpatrick v. United States*, 432 Fed. App'x 937, 939 (11th Cir. 2011) (holding that officers had arguable reasonable suspicion to detain a person driving a van with anti-ATF messages through a federal building parking lot on the anniversary of the Waco fire and Oklahoma City bombing). Yet a suspect can plausibly allege that an arresting officer was motivated by animus toward the content of unpopular speech challenging authority.

- Speech can evince a "guilty state of mind." *District of Columbia v. Wesby*, 138 S. Ct. 577, 587-88 (2018) (concluding that a suspect's "nervous, agitated, and evasive" responses to police questioning supported probable cause). An

officer may reasonably infer from a person's hostile response to questioning, combined with other suspicious conduct, that he may be guilty of committing the crime in question. Yet a suspect can plausibly allege—as Bartlett does in this case—that the arrest was retaliation for the suspect's hostility. J.A. 257, 262, 270, 299.

- Speech can indicate an intent to persist in unlawful conduct. Thus an officer could reasonably conclude from a trespasser's sign that he would not be persuaded by a request to move along. *Cf. Dukore v. District of Columbia*, 799 F.3d 1137, 1143 (D.C. Cir. 2015) (noting that the identification of a person's tent with the "Occupy D.C." movement—"the purpose of which was use of the tent for the 'physical occupation' of protest sites"—supported probable cause to arrest for violation of an ordinance prohibiting establishment of temporary places of abode on public property). And a person's adamant challenge to a court order of eviction would support a reasonable belief that she would not voluntarily leave the premises, supporting a decision to arrest her for trespass. *Morgan v. County of Hawaii*, No. CV 14-00551 SOM-BMK, 2016 WL 1254222, at *1-4, 15 (D. Haw. Mar. 29, 2016). Yet a suspect can plausibly allege that the officer acted on animus towards the content of the protest.

- Speech flaunting criminality might bring a suspect's conduct to the police's attention in the first place. *Wayte v. United States*, 470 U.S. 598, 609-10 (1985) (upholding the government's

> "passive enforcement" policy of prosecuting only those who reported themselves as having failed to register for the Selective Service or who were reported for doing so). And once police are aware, they can validly consider the effect that failing to arrest an outspoken offender might have on others considering whether to break the law. *Id.* at 613 (ruling that the passive enforcement policy was justified in part because "failing to proceed against publicly known offenders would encourage others to violate the law"). So officers at a rowdy public festival could validly consider the danger that a person's vocal refusal to comply with a lawful order might encourage others to do the same, leading the situation to get out of control. Yet a suspect can plausibly allege that he was singled out for being vocal.

Indeed, determining causation in retaliatory arrest claims will be difficult even if the suspect's speech had no connection to the conduct he was arrested for. A possible inference of retaliation will exist almost any time "speech is made . . . contemporaneously to[] criminal activity." *Lozman*, 138 S. Ct. at 1953-54. An arrest could produce a retaliatory arrest lawsuit whenever the suspect insults a police officer, *White v. County of San Bernadino*, 503 Fed. App'x 551, 555 (9th Cir. 2013) (retaliatory arrest claim premised on suspect's cursing at arresting officers); criticizes an officer in the performance of her duties, *Dell'Orto v. Stark*, 123 Fed. App'x 761, 762-63 (9th Cir. 2005) (retaliatory arrest claim premised on criticism of officer for arresting plaintiff's friend)); participates in a protest or rally, *Maidhof v. Celaya*, 641 Fed. App'x 734,

737-38 (9th Cir. 2016) (retaliatory arrest claim premised on decision to arrest protesters trespassing on public property); or sports a controversial bumper sticker, *Kilpatrick*, 432 Fed. App'x at 939-40 (retaliatory arrest claim premised on anti-authority messages on plaintiff's van).

The charged circumstances of many arrests only heighten the difficulties of establishing causation in retaliatory arrest cases. Unlike an employment retaliation case, for example, in a retaliatory arrest case there usually will be no paper trail of annual performance evaluations and email exchanges from which to glean an officer's true motives. And the plaintiff and defendant likely will not have a long history of interactions—reinforced by observations of coworkers in a relatively calm workplace setting—to guide the jury to reliable conclusions about motive and causation. Instead, the jury in a retaliatory arrest case will often have to rely on only a few witnesses' memories of a tense, adrenaline-fueled encounter to divine a police officer's subjective motive for making the arrest. So it is in this case. No one's recollection of the encounter between Bartlett and the troopers matches exactly what was captured on video, which is unsurprising given how rapidly and unpredictably arrests often unfold.[4] And a plaintiff in a § 1983 case

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[4] For example, the troopers' police reports from the incident state that Bartlett attempted to swing a fist and to head-butt Sgt. Nieves. J.A. 16-17 The video footage does not show any punch being thrown, yet it does show that as Sgt. Nieves grabbed Bartlett, Bartlett clenched his fist and swung his arm around in a way that could look like an incipient punch. Resp. App. Disk 2. And while the video does not show a head-butt, it shows Bartlett resisting the takedown by arching his head and neck against

can use such small discrepancies in the police's recollection of events to create an inference of retaliatory motive—as Bartlett does here by asserting that the police exaggerated the level of threat he posed as cover for their retaliatory actions. J.A. 32.

The Ninth Circuit's rejection of a probable cause element overlooks all these difficulties. In *Skoog v. County of Clackamas*, the Ninth Circuit focused narrowly on the facts of the particular claim before it and reasoned that because it did "not involve multi-layered causation as did the claim in *Hartman*," the case presented an "ordinary retaliation claim" that did not warrant *Hartman*'s probable cause element. 469 F.3d 1221, 1234 (2006). Yet neither *Skoog* nor the circuit court's later decisions (which treat *Skoog* as applying to all retaliatory arrest claims) considered that many retaliatory arrest cases do feature some combination of multi-layer causation, the difficulty of discerning whether the officer considered speech for legitimate or illegitimate reasons, and "split-second judgments," *Lozman*, 138 S. Ct. 1953, that make resolving disputed questions about subjective intent especially difficult. *See Ford v. City of Yakima*, 706

Trooper Weight's hands, which could have looked to Trooper Weight like Bartlett was trying to slam his head back into Sgt. Nieves, standing behind him. Resp. App. Disk 1; J.A. 421. On the other side, in Bartlett's initial account of the encounter (an affidavit in his criminal case), he asserted that Trooper Weight "shov[ed] me to the ground." J.A. 529. Bartlett's friend Krack also testified in his deposition that Trooper Weight's push caused Bartlett to land on his knee. J.A. 202. Yet the video shows, and the district court specifically found, that Bartlett remained standing after the push and only went to the ground after being forced down several moments later by the troopers. Pet App. 12; Resp. App. Disk 1.

F.3d 1199, 1194 & n.2 (9th Cir. 2013); *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 901 & n.5 (9th Cir. 2008); *Beck v. City of Upland*, 527 F.3d 853, 864 n.12 (9th Cir. 2008); *Skoog*, 469 F.3d at 1234-35.

2. A probable cause element overcomes that difficulty. In retaliatory arrest claims, just as in retaliatory prosecution claims, probable cause is a "potential feature of every case, with obvious evidentiary value" on the most challenging question: what was the true cause of the arrest? *Hartman*, 547 U.S. at 265. "Demonstrating that there was no probable cause for the [arrest] will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for" the arrest, "while establishing the existence of probable cause will suggest that the [arrest] would have occurred even without a retaliatory motive." *Id.* at 261. The inquiry into probable cause takes into account "the events which occurred leading up to the [arrest], and . . . whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to . . . probable cause." *Ornelas v. United States*, 517 U.S. 690, 696 (1996). The best indicator of what the officer would have done absent retaliatory motive is whether "the known facts and circumstances are sufficient to warrant a [person] of reasonable prudence in the belief" that an arrest would be appropriate. *Id.*

Particularly when law enforcement officers must make "singularly swift, on the spot" decisions involving the safety others or themselves, *Reichle*, 566 U.S. at 671 (Ginsburg, J. concurring), it is reasonable to infer that an officer would—and should—have arrested a suspect if it was reasonable to believe he "posed an

immediate threat" to the public safety. *Id.* at 672. Given the strong link between probable cause and the decision to arrest, even the Ninth Circuit has conceded that probable cause "undoubtedly 'ha[s] high probative force' " in determining whether a law enforcement officer would have made an arrest absent the suspect's exercise of protected speech, *Dietrich*, 548 F.3d at 901 (quoting *Hartman*, 547 U.S. at 265). While probable cause is "not necessarily dispositive," *Hartman*, 547 U.S. at 265, it nonetheless serves as the most reliable indicator of whether an officer's retaliatory motive prompted the arrest. "Because showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require" that showing as an element of the tort of retaliatory arrest—just as it does for retaliatory prosecution claims. *Id.* at 265-66.

B. The Court's preference for objective tests to govern police officers' conduct supports a probable cause element for retaliatory arrest claims.

Requiring a probable cause element for retaliatory arrest claims is consistent with the Court's preference for objective tests to judge the constitutionality of police officers' conduct. "[O]bjective standards of conduct" promote "evenhanded law enforcement," *Kentucky v. King*, 563 U.S. 452, 464 (2011) (quoting *Horton v. California*, 496 U.S. 128, 138 (1990)), and protect against judicial "expedition[s] into the minds of police officers," *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984). Those considerations apply with special force to

retaliatory arrest claims. Because it is easy to allege improper motive and difficult to prove or disprove causation in these cases, officers are especially vulnerable to "dubious retaliatory arrest suits," *Lozman*, 138 S. Ct. at 1953, that distract them from their jobs and deter them from making justified arrests.

1. The Court generally "reject[s] . . . subjective inquiries" when delineating rules for law enforcement. *Michigan v. Bryant*, 562 U.S. 344, 360 n.7 (2011). For example, to establish a claim of false arrest in violation of the Fourth Amendment, a plaintiff must demonstrate that the arrest was objectively unreasonable by showing a lack of probable cause. *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004). "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren v. United States*, 517 U.S. 806, 813 (1996). Even in situations that might invite greater abuse of law enforcement power, the Court has rejected subjective inquiries into officer motivation. When courts must determine whether an officer relied in good faith on an invalid warrant, the "good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal." *Leon*, 468 U.S. at 919-21, 922 n.23. And although the Court recognized the possibility that moving violations can easily be used to justify pretextual traffic stops based on unlawful motives, it rejected a special Fourth Amendment test for traffic stops that was "plainly and indisputably driven by subjective considerations." *Whren*, 517 U.S. at 810, 814. Likewise, the Court uses objective tests that do not depend on the intent of the police to determine whether

an interrogation has occurred and whether it was custodial for Fifth Amendment *Miranda* purposes. *J.D.B. v. North Carolina*, 564 U.S. 261, 270-71 (2011); *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). And in the Sixth Amendment context, the Court employs an objective test to determine whether an emergency existed for the purposes of the Confrontation Clause. *Bryant*, 562 U.S. at 360, 361 n.8.

Even when an officer's motive is an essential element of a claim, the constitutional analysis does not turn solely on an inquiry into the officer's subjective intent. To prove discriminatory or selective prosecution in violation of the Equal Protection Clause, a plaintiff must satisfy both a subjective and an objective element: she "must demonstrate [both] that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.' " *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)). The objective prong—discriminatory effect—may be established by showing that similarly situated persons "could have been prosecuted, but were not," for the same offense. *Armstrong*, 517 U.S. at 465, 469. This standard has been extended to other types of selective enforcement claims—including arrests, fines, and traffic stops—in nearly every circuit. *See, e.g.*, *Alexis v. McDonald's Restaurants of Massachusetts, Inc.*, 67 F.3d 341, 353–54 (1st Cir. 1995); *LaTrieste Rest. & Cabaret Inc. v. Vill. of Port Chester*, 40 F.3d 587, 590, 592 (2d Cir. 1994); *Startzell v. City of Philadelphia, Pennsylvania*, 533 F.3d 183, 191 (3d Cir. 2008); *Stout v. Vincent*, 717 F. App'x 468, 471 (5th Cir. 2018); *Stemler v. City of Florence*, 126 F.3d 856, 872 (6th Cir. 1997); *Marcavage v. City of Chicago*, 659 F.3d

626, 631–32 (7th Cir. 2011); *Johnson v. Crooks*, 326 F.3d 995, 999–1000 (8th Cir. 2003); *Richards v. City of Los Angeles*, 261 F. App'x 63, 65-66 (9th Cir. 2007); *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1166 (10th Cir. 2003); *Rylee v. Chapman*, 316 F. App'x 901, 907 (11th Cir. 2009).

And of course, the Court adopted an "objective fact requirement" for the motive-based constitutional tort of retaliatory prosecution. 547 U.S. at 258. Although the *Hartman* decision did not involve police officers in the field, its rationale rested in part on the need to protect the essential law enforcement interests embodied in the "presumption of regularity accorded to prosecutorial decisionmaking." *Hartman*, 547 U.S. at 263. The Court's reluctance to inquire into prosecutors' decisions stems from the danger that doing so will "chill law enforcement" and "undermine prosecutorial effectiveness." *Armstrong*, 517 U.S. at 465 (quoting *Wayte*, 470 U.S. at 607). Reasoning that "judicial intrusion into executive discretion of such high order should be minimal," the Court in *Hartman* was not willing to permit retaliatory prosecution claims—which necessitate an inquiry into the prosecutor's motivation for bringing charges—without an "objective fact requirement" creating a strong inference of causation. *Hartman*, 547 U.S. at 258, 263-64 (citing *Wayte*, 470 U.S. at 607-08). Just as the Court has rejected a purely subjective inquiry for other motive-based claims involving law enforcement interests, it should reject a purely subjective inquiry for retaliatory arrest claims as well.

2. Eschewing purely subjective standards for police officers' conduct serves important societal interests. "[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *King*, 563 U.S. at 464. Because "the balancing of the competing interests" in the law enforcement context "must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers," the Court has expressed a "general preference to provide clear guidance to law enforcement through categorical rules." *Riley v. California*, 134 S. Ct. 2473, 2491–92 (2014) (quoting *Michigan v. Summers*, 452 U.S. 692, 705 n.19 (1981)).

Adopting a probable cause element for retaliatory arrest claims ensures that officers can protect public safety without fear that a suspect's protected speech will give rise to a difficult-to-defend lawsuit. Officers need to make "split-second judgments" "in circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). Officers confronted with the type of situation that led to Bartlett's arrest, "where spontaneity rather than adherence to a police manual is necessarily the order of the day," may necessarily "act out of a host of different, instinctive, and largely unverifiable motives." *New York v. Quarles*, 467 U.S. 649, 656 (1984). Indeed, "given the complex dynamic between legitimate assessments of harm and illegitimate attitudes toward opinions," Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 440 (1996) (discussing the complexity of determining

motive in the First Amendment legislative context), the arresting officer herself may not know the extent to which some amount of impermissible animus influences her read of the situation. But when an officer is faced with a threat to public safety, the law should not discourage her from acting decisively. Police officers should be able to enforce the law knowing that their actions will be judged according to objective standards.

This case offers a useful illustration of the dilemma that officers will face if their conduct is judged by a jury's guess at their subjective intent. Trooper Weight and Sgt. Nieves believed not only that Bartlett was going to interfere with their investigation, but that he was intoxicated and aggressive. J.A. 140-41, 150-51, 157. Had the troopers known that arresting him would spiral into a trial on a retaliatory arrest claim, they might have declined to do so, even though it was reasonable under the circumstances. Yet that would have meant leaving a drunk, belligerent man at a remote outdoor party in the middle of the night. That is not the kind of decision that society or the courts should encourage officers to make. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 351 (2001) (declining Fourth Amendment rule that "would come at the price of a systematic disincentive to arrest in situations where . . . arresting would serve an important societal interest"). If the Court rules that probable cause does not bar retaliatory arrest claims, this dilemma is likely to arise in countless routine encounters involving simple assault, disorderly conduct, trespass, or other minor offenses that sometimes pose a danger to public safety.

Using objective standards also promotes the "strong public interest in protecting public officials from the costs associated with the defense of damages actions." *Crawford-El*, 523 U.S. at 590. In any retaliation case "an official's state of mind is easy to allege and hard to disprove," making even "insubstantial claims . . . less amenable to summary disposition than other types of claims against government officials." *Id.* at 584-85 (internal quotations omitted). This problem is all the more vexing in retaliatory arrest cases because of the proximity of protected speech and actionable conduct, the often legitimate role that speech plays in the decision to arrest, and the charged circumstances in which most arrests take place.

Forcing officers to litigate the good faith of their actions imposes "substantial costs." *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982). When an officer's subjective intent is at issue, "there often is no clear end to the relevant evidence," exposing the officer and her employer to "broad-ranging discovery and the deposing of numerous persons, including [the officer's] professional colleagues." *Id.* at 817. These inquiries are "peculiarly disruptive of effective government." *Id.* Even more concerning is "the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible . . . in the unflinching discharge of their duties." *Id.* at 814 (internal quotations omitted).

Without an "objective fact requirement" like probable cause, these costs will be incurred even for insubstantial claims. This is the result in the Ninth Circuit, with its rule that probable cause does not bar a retaliatory arrest claim:

- *Mam v. City of Fullerton*, No. 8:11–cv–1242–JST (MLGx), 2013 WL 951401 (C.D. Cal. 2013). An officer arrested the plaintiff after he repeatedly disobeyed orders to back up while police attempted to break up a fight. The district court held that the officer had probable cause to arrest him for willful obstruction of a peace officer. *Id.* at *3–4. It nonetheless denied summary judgment as to the plaintiff's retaliatory arrest claim because it believed that a jury could find officers arrested him because he was exercising his right to videotape the police. The case was not "close"—after an eight-day trial "the jury spent only approximately two hours deliberating before reaching a unanimous verdict." No. SACV 11-1242-JLS (MLGx), 2014 WL 12573550, at *3 (C.D. Cal. July 24, 2014).

- *Morse v. San Francisco Bay Area Rapid Transit District*, No. 12–cv–5289 JSC, 2014 WL 572352 (N.D. Cal. Feb. 11, 2014). The plaintiff, an online journalist, had a long history of criticizing and attending protests of the local transit system. *Id.* at *1. During a protest, the plaintiff joined others in blocking fare gates. *Id.* at *14. Police arrested him because he was an "active participant," "marching . . . around the ticket vendors, blocking fare gates, [and] impeding the flow of patrons." *Id.* at *6. The district court held that the arrest was supported by probable cause, but sent his retaliation claim to the jury because of his earlier speech and his allegation that the police treated him differently from other participants. *Id.* at *9-11. After a four-day trial, the jury found that the plaintiff's speech "was

[not] a 'but for' cause" of his arrest. ECF 119, No. 12-cv-05289.

- *Holland v. City of San Francisco*, No. C10–2603 TEH, 2013 WL 968295 (N.D. Cal. Mar. 12, 2013). At a protest, a woman challenged officers for arresting her girlfriend and repeatedly disobeyed lawful orders by the police to stand back. While standing close to the officers she made physical contact with them, and they arrested her. *Id.* at *1. The court concluded that the officers had probable cause to arrest her but had to face trial on her retaliatory arrest claim because one could infer that the protester "would not have been arrested" but for "her persistent questioning of the officers and verbal challenges to their authority." *Id.* at *3, *5. After a five-day jury trial held three years after the protester filed her complaint, the jury found that the defendants had not "retaliated against her in violation of her First Amendment rights." ECF 168, No. 10-cv-2603.

- *Eberhard v. California Highway Patrol*, No. 3:14-cv-01910-JD, 2015 WL 6871750 (N.D. Cal. Nov. 9, 2015). The plaintiff covered a controversial construction project for a local newspaper. During a protest, police arrested him for trespass because he was in an area of the site "fenced off from the public" and "marked off by no trespassing signs," and he lacked the escort that he needed to be at the site. *Id.* at *4. The court nonetheless allowed his retaliation claim to go to the jury, because he alleged (among other things) that the officers knew he

> was a journalist, knew he was onsite to cover the protest, knew he had criticized the Highway Patrol, and had made comments about prior incidents between the plaintiff and the police. *See id.* at *7. Two years after the plaintiff filed his complaint, the jury unanimously determined that the officer had not "violated [his] First Amendment rights." ECF 275, No. 14- cv-1910.

In light of outcomes like these, the Ninth Circuit has recognized that summary judgment is not up to the task of "protecting government officials from the disruption caused by unfounded claims." *Dietrich*, 548 F.3d at 901. For that reason the Ninth Circuit has altered the standard for summary judgment in retaliatory arrest claims by adding a rule of thumb to guide the district courts: cases with "very strong evidence of probable cause and very weak evidence of a retaliatory motive" should ordinarily result in summary judgment. *Id.* (cited in *Maidhof*, 641 F. App'x at 735; *White*, 503 F. App'x at 553).

But the Ninth Circuit's solution is not only the kind of procedural improvisation that "lacks any common-law pedigree" or "precedential grounding," *Crawford-El*, 523 U.S. at 594-95, it does not work very well, either. The imprecise weighing it requires necessarily turns on the diverse perspectives of individual judges about what evidence of probable cause counts as "very strong," what evidence of retaliatory motive counts as "very weak," and how to balance those categories of evidence against one another. *E.g., compare Maidhof*, 641 F. App'x at 736-37 (affirming summary judgment because there was probable cause for arrest and "evidence of retaliatory intent is weak"), *with id.* at 737

(Rawlinson, J., dissenting) (finding sufficient "circumstantial evidence of retaliation" to preclude summary judgment); *compare White*, 503 F. App'x at 553 (affirming summary judgment because the evidence of retaliatory motive for a pat-down search was "weak") *with id.* at 555 (Graber, J., dissenting) (maintaining that there was sufficient evidence for fact-finder to conclude that pat-down search was motivated by the plaintiff's insult). The Ninth Circuit's standard invites inconsistent results and so provides only scattershot protection against unfounded claims. By contrast, an objective element like probable cause—which aptly screens meritless claims from meritorious ones—is far more judicially manageable and consistent with this Court's decisions articulating the constitutional standards governing officers' conduct.

3. An objective test—though imperfect like any other test—is preferable to the alternative of litigating an officer's subjective intent in each of the countless cases when "speech is made in connection with, or contemporaneously to, criminal activity." *Lozman*, 138 S. Ct. 1953-54. Of course, the existence of probable cause is "not necessarily dispositive" of causation, *Hartman*, 547 U.S. at 265, and a probable cause element will occasionally screen out meritorious claims. The same is true whenever an objective standard is used: some actions driven by improper motive will not result in liability.

But as the *Hartman* decision shows, an "objective fact requirement" is a better approach to the "causation concern" that afflicts both retaliatory prosecution and retaliatory arrest claims than the alternative: leaving

the matter to "such pleading and proof as the circumstances allow" in each individual case, with "hassles over the adequacy" of evidence "the predictable result." *Id.* at 258, 264 & n.10. Once a colorable claim of retaliatory motive is put forth, "it is impossible to know whether the claim is well founded until the case has been tried." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.). Given the causal complexity of retaliatory arrest claims, an objective element that has "powerful evidentiary significance" on the issue of retaliatory causation, *Hartman*, 547 U.S. at 261, will likely be at least as reliable in ferreting out improper police action as a test that turns solely on the officer's subjective intent. *See Missouri v. Seibert*, 542 U.S. 600, 626 (2004) (O'Connor, J., dissenting) ("There is no reason to believe that courts can with any degree of success determine in which instances the police had an ulterior motive." (quoting W. LaFave, Search and Seizure § 1.4(e), p. 124 (3d ed. 1996))); *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984) ("[S]ending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources."); *Quarles*, 467 U.S. at 656 (application of a public safety exception to the *Miranda* warning requirement "should not be made to depend on post hoc findings concerning subjective motivation of the arresting officer" acting on "a host of different, instinctive, and largely unverifiable motives").

II. A probable cause element for retaliatory arrest claims is consistent with the weight of authority at common law.

The other main guide to determining the elements of a constitutional tort—the common law—supports a probable cause element too. In the common-law torts most analogous to a claim of First Amendment retaliatory arrest, a finding of probable cause for the arrest bars recovery. The practice and wisdom of common law courts should lead this Court to apply a similar rule to retaliatory arrest claims.

In defining the "contours and prerequisites of a § 1983 claim" premised on an alleged constitutional violation, "courts are to look first to the common law of torts." *Manuel*, 137 S. Ct. at 920 (citing *Carey*, 435 U.S. at 257-58). This is because § 1983 creates "a species of tort liability" when someone acting under the color of state law deprives another of a constitutional right, *Imbler*, 424 U.S. at 417, and the Constitution's provisions are "framed in the language of the English common law, and are to be read in the light of its history." *Smith v. State of Alabama*, 124 U.S. 465, 478 (1888). The common law may be more a "source of inspired examples than of prefabricated components" for constitutional torts under § 1983. *Hartman*, 547 U.S. at 258. Yet the Court heeds the common law's example when "identifying both the elements of the cause of action and the defenses available to state actors" under § 1983 because "Congress intended the statute to be construed in light of common law principles that were well settled at the time of its enactment." *Kalina v. Fletcher*, 522 U.S. 118, 123

(1997) (citing *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Briscoe v. LaHue*, 460 U.S. 325, 330 (1983)).

At the time of § 1983's enactment, there was no common-law tort for retaliatory arrest in violation of the freedom of speech. *Lozman*, 138 S. Ct. at 1957 (Thomas, J., dissenting) (citing *Hartman*, 547 U.S. at 259). In past cases where an offense did not exist at common law, this Court has looked to the common-law causes of action that provide the "closest analogy." *Heck v. Humphrey*, 512 U.S. 477, 484 (1994). Here, the three arrest-based torts that existed at common law—malicious prosecution, malicious arrest, and false imprisonment—provide that analogy. *Lozman*, 138 S. Ct. at 1957 (Thomas, J., dissenting).

At common law, probable cause defeated malicious prosecution and malicious arrest claims, and a great majority of states and authorities held that probable cause defeated false imprisonment claims as well. Malicious prosecution and malicious arrest consisted of using the criminal law out of an "evil motive," *Wheeler v. Nesbitt*, 65 U.S. 544, 550, 24 How. (1860)—including a motive of retaliating against speech, *Stoecker v. Nathanson*, 98 N.W. 1061, 1061 (Neb. 1904) (involving allegation that plaintiff was arrested for being "too mouthy"). Bringing these claims at common law required proving a lack of probable cause to make the arrest. *See, e.g., Wheeler*, 65 U.S. at 550 ("Want of reasonable and probable cause is as much an element in the action for a malicious criminal prosecution as the evil motive which prompted the prosecution to make the accusation . . . ."); *Ahern v. Collins*, 39 Mo. 145, 150 (1866) (noting that "want of probable cause" is a "necessary ingredient[]" in both malicious prosecution

and malicious arrest claims); *Cardival v. Smith*, 109 Mass. 158, 158 (1872) (observing it "well settled" that a want of probable cause must be proved in an action for malicious arrest or prosecution). Even if an officer had a nefarious motive for arresting someone, the existence of probable cause for the arrest defeated a malicious arrest or prosecution claim. *See Crescent City Livestock Co. v. Butchers' Union Slaughter-House Co.*, 120 U.S. 141, 149 (1887) ("If he had probable cause to institute his action, the motives by which he was activated . . . are not material.").

Probable cause usually defeated a claim of false imprisonment at common law too. False imprisonment is the tort of confining a person against her will without legal justification. *Wallace v. Kato*, 549 U.S. 384, 388-89 (2007) (citing M. Newell, Law of Malicious Prosecution, False Imprisonment, and Abuse of Legal Process § 2, p. 57 (1882) (footnotes omitted)). False imprisonment claims could be brought against private citizens or peace officers, but the tort gave special protection to peace officers. *Hawley v. Butler*, 54 Barb. 490, 493 (N.Y. 1868). Although private citizens were always liable for false imprisonment if the arrestee had not actually committed a felony, the law excused peace officers if they had based the arrest on "reasonable grounds of belief" (i.e., probable cause) that the arrestee had done so. *Lozman*, 138 S. Ct. 1945, 1957 (Thomas, J., dissenting) (citing T. Cooley, Law of Torts 175 (1880); 2 C. Addison, Law of Torts § 803, p.18 (1876); 1 F. Hillard, The Law of Torts of Private Wrongs § 18, pp. 207-08 & n. (a) (1866)).

Accordingly, most courts held that probable cause defeated a common law false imprisonment claim. *E.g.*, *Hawley*, 54 Barb. at 492-93 ("The absence of probable cause was always . . . a necessary declaration."); *Fagan v. Pittsburgh Terminal Coal Corp.*, 149 A. 159, 163 (Pa. 1930) ("Whether guilty or not, if there was probable cause for arresting the plaintiff, the act of the officer would be justified."); *Dir. Gen. of Railroads v. Kastenbaum*, 263 U.S. 25, 27-28 (1923). In 38 states and the District of Columbia, probable cause is either a bar to false imprisonment cases[5] or an affirmative defense.[6] As in malicious prosecution cases, probable

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[5] *Upshaw v. McArdle*, 650 So. 2d 875, 878 (Ala. 1994); *Yi v. Yang*, 282 P.3d 340, 345 n.7, 347 (Alaska 2012); *Beebe v. De Baun*, 8 Ark. 510, 510 (1848); *Rose v. City & Cty. of Denver*, 990 P.2d 1120, 1123 (Colo. App. 1999); *Beinhorn v. Saraceno*, 582 A.2d 208, 210 (Conn. 1990); *Clark v. Alloway*, 170 P.2d 425, 428 (Idaho 1946); *Grainger v. Harrah's Casino*, 18 N.E.3d 265, 276 (Ill. App. Ct. 2014); *Row v. Holt*, 864 N.E.2d 1011, 1016 & n.4 (Ind. 2007); *Peterson Novelties, Inc. v. City of Berkley*, 672 N.W.2d 351, 362 (Mich. Ct. App. 2003); *Johnson v. Morris*, 453 N.W.2d 31, 36 (Minn. 1990); *Adams v. City of Raleigh*, 782 S.E.2d 108, 112 (N.C. Ct. App. 2016); *Thyen v. McKee*, 584 N.E.2d 23, 25 (Ohio Ct. App. 1990); *Delong v. State ex rel. Oklahoma Dept. of Public Safety*, 956 P.2d 937, 939 (Okla. Civ. App. 1998); *Dyson v. City of Pawtucket*, 670 A.2d 233, 239 (R.I. 1996); *McBride v. Sch. Dist. of Greenville Cty.*, 389 S.C. 546, 567-68 (S.C. Ct. App. 2010); *Heib v. Lehrkamp*, 704 N.W.2d 875, 884 (S.D. 2005); *Richards v. O'Connor Managment, Inc.*, No. 01A01-9708-CV-00379, 1998 WL 151392, at *5 (Tenn. Ct. App. Apr. 3, 1998); *Crowell v. Kirkpatrick*, 667 F.Supp.2d 391, 417 (D. Vt. 2009).

[6] *White v. Martin*, 30 Cal. Rptr. 367, 369 (Ct. App. 1963); *McCaffrey v. Thomas*, 56 A. 382, 383 (Del. Super. Ct. 1903); *Minch v. D.C.*, 952 A.2d 929, 937 (D.C. 2008); *Toomey v. Tolin*, 311 So. 2d 678, 680–81 (Fla. Dist. Ct. App. 1975); *Reed v. City & Cty. of Honolulu*, 873 P.2d 98, 109 (Haw. 1994); *Children v. Burton*, 331 N.W.2d 673, 679 (Iowa 1983); *Hill v. Day*, 215 P.2d 219, 224 (Kan. 1950); *Brown v. City of Monroe*, 135 So. 3d 792, 796 (La. Ct. App. 2014); *Jackson*

cause defeated a claim of false imprisonment even if an officer had an "ulterior motive" in making the arrest. Restatement (First) of Torts § 127, cmt. a., illus. 2 (Am. Law Inst. 1934).[7]

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v. Knowlton, 173 Mass. 94, 96–97 (1899); *Kichnet v. Butte-Silver Bow County*, 274 P.3d 740, 745 (Mont. 2012); *State ex rel. Douglas v. Ledwith*, 281 N.W.2d 729, 736 (Neb. 1979); *Farrelly v. City of Concord*, 130 A.3d 548, 560 (N.H. 2015); *Mesgleski v. Oraboni*, 748 A.2d 1130, 1138–39 (N.J. Super. Ct. App. Div. 2000); *State v. Johnson*, 930 P.2d 1148, 1153–54 (N.M. 1996); *Broughton v. State*, 335 N.E.2d 310, 315 (N.Y. 1975); *Haggard v. First Nat. Bank of Mandan*, 8 N.W.2d 5, 15 (N.D. 1942); *Bacon v. City of Tigard*, 724 P.2d 885, 886 (Or. Ct. App. 1986); *Mikelberg v. Philadelphia Rapid Transit Co.*, 16 Pa. D. 906, 907-08 (Pa. Com. Pl. 1907); *Terry v. Zions Coop. Mercantile Inst.*, 605 P.2d 314, 320 (Utah 1979), overruled on other grounds by *McFarland v. Skaggs*, 678 P.2d 298, 304–05 (Utah 1984); *Coles v. McNamara*, 230 P. 430, 432 (Wash. 1924); *Rodarte v. City of Riverton*, 552 P.2d 1245, 1258 (Wyo. 1976).

[7] This section of the Restatement concluded that an arrest by a peace officer is privileged irrespective of motive. The section provides that an arrest is privileged if "the actor makes the arrest for the *purpose* of bringing the other before a court, body, or official or otherwise securing the administration of the law." Rest. (First) Torts § 127 (emphasis added). And the comment distinguishes between an officer's "purpose" in making the arrest and his "motive." *Id.* cmt. a. "Purpose" means "an objective, goal, or end." Black's Law Dictionary (10th ed. 2014). As the examples that follow make clear, an inquiry into purpose entails what was the "end to be attained" from the arrest: to bring the suspect to court, or to achieve some other end like shaking down the suspect for money. *See* Rest. (First) Torts § 127 cmt. a, illus. 2. But the comment notes that if the arrest was for the proper purpose of bringing the suspect before the courts, then the arrest is privileged even if the officer "ha[d] an ulterior *motive* in making it." "Motive" means "something, esp. willful desire, that leads one to act." Black's Law Dictionary (10th ed. 2014). Thus at common law, so long as the officer made the arrest for the end or goal of bringing

The probable cause element in common law false imprisonment, malicious prosecution, and malicious arrest claims had sound justifications. Most importantly, it served the public interest in bringing criminals to justice. *Hogg v. Pinckney*, 16 S.C. 387, 393 (1882); *Brockway v. Crawford*, 3 Jones 433, 437 (N.C. 1856). Courts feared that "ill consequences would ensue to the public, for no one would willingly undertake to vindicate a breach of the public law . . . with the prospect of an annoying suit staring him in the face." *Ventress v. Rosser*, 73 Ga. 534, 541 (1884). And courts understood that such annoying suits would not be exceptions, because "malice might easily be inferred sometimes from idle and loose declarations." *Chesley v. King*, 74 Me. 164, 176 (1882). In such cases, officers would struggle to prove their innocence if they could not rely on the probable cause bar: "litigation would be endless if the motives of those who are simply enforcing a legal claim were made the subjects of inquiry." *Id.* at 175. By giving officers a clear standard to determine whether they could lawfully make an arrest, officers could enforce the law and protect their community without fear of liability, so long as they had probable cause. *Ledwith v. Catchpole*, 2 Cald. 291, 295 (K.B. 1783).

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the suspect to court or "securing the administration of the law," the arrest was privileged regardless of why the officer desired to do so. *See* Rest. (First) Torts § 127 cmt. a, illus. 1. Because there is no allegation that the troopers arrested Bartlett for the purpose of doing something other than bringing him before the courts—*e.g.*, shaking him down for money—the arrest would be privileged at common law.

Because Congress intended § 1983 "to be construed in light of common law principles that were well settled at the time of its enactment," *Kalina*, 522 U.S. at 123, the common law's unwillingness to hold peace officers who had probable cause to arrest liable—whatever their motives—supports a probable cause element for § 1983 retaliatory arrest claims.

III. A probable cause element that filters strong retaliatory arrest claims from weak ones comports with the purposes and values of the First Amendment.

When "defining the contours and prerequisites of a § 1983 claim," "courts must closely attend to the values and purposes of the constitutional right at issue." *Manuel*, 137 S. Ct. at 920-21. A probable cause element—which will permit recovery for the arrests most likely caused by retaliatory animus while filtering out those that are not—is consistent with the values and purposes of the First Amendment.

In tailoring the contours of a § 1983 claim to the values of the constitutional right at issue, the Court need not reject every rule, however logical or salutary, that would make recovery harder for plaintiffs to obtain. Instead, as *Hartman* shows, Court can define the elements of a § 1983 claim alleging violation of the First Amendment in a way that "makes sense" in light of the "details specific to" the tort itself, even if doing so might preclude recovery for meritorious claims in rare instances. *Hartman*, 547 U.S. at 259, 264-66. The *Hartman* case had strong evidence of retaliatory motive (the court of appeals observed that it "came close to the proverbial smoking gun," *Moore v. Hartman*, 388 F.3d 871, 884 (D.C. Cir. 2004)) against speech of the highest

value. *Id.* at 252-54. And the Court recognized the possibility that strong evidence of retaliatory causation would occasionally coexist with probable cause to bring charges. *Id.* at 264. But rather than fashioning a rule based on the most egregious circumstances—which are "likely to be rare and consequently poor guides in structuring a cause of action"—the Court instead "defin[ed] the elements of the tort" with an eye to the typical case. *Id.* The elements of a § 1983 claim need not permit recovery in every case in order to be consistent with the values of the First Amendment.

And the Court is sensitive to "the evils inevitable in any alternative" when determining the contours of a constitutional tort under § 1983. *Crawford-El*, 523 U.S. at 591 (quoting *Harlow*, 457 U.S. at 813-14). With retaliatory arrest claims, this means considering both the "risk that some police officers may exploit the arrest power as a means of suppressing speech" and the risk that "the complexity of proving (or disproving) causation in these cases" will leave officers vulnerable to "dubious retaliatory arrest suits." *Lozman*, 138 S. Ct. at 1953.

The Court considered these competing risks in *Lozman* and deemed the more permissive *Mt. Healthy* standard the correct one for the "unique class" of claims before it—claims involving arrest stemming from official retaliatory policy. *Id.* at 1954-55. For that unique type of retaliatory arrest case, the Court noted both the "high" value of the speech allegedly retaliated against and the "particularly troubling and potent" threat to speech from retaliation by government policymakers, and it concluded that there is a

"compelling need" for redress via damages action when retaliation stems from an official government policy. *Id.* at 1954-55.

But *Lozman* was an unusual retaliatory arrest case; there is a far less compelling need for a damages remedy in the typical case in which an "ad hoc, on-the-spot decision by an individual officer" is alleged to be retaliatory. *Lozman*, 138 S. Ct. at 1954. For such typical cases, a probable cause element that effectively sorts between improper arrests and proper ones adequately protects First Amendment values for two main reasons.

First, an individual police officer's decision to arrest due to retaliatory motive is much less corrosive to First Amendment values than when "the government itself orchestrates the retaliation." *Id.* An official policy of retaliation means that the government has taken sides against ideas or information it dislikes in the hope of eliminating them from the public square. This evil is the core concern of the First Amendment. *Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 548 n.9 (1980) (Stevens, J., concurring) ("[A] value at the very core of the First Amendment [is] the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))). And if the government itself decides to retaliate against a disfavored individual using the arrest power, it has far more resources at its disposal to carry out that plan than an individual officer. For these reasons, an official policy of retaliation is a "particularly troubling and potent form of retaliation"

that creates a "compelling need" for redress via civil damages action, *Lozman*, 138 S. Ct. at 1934.

By contrast, arrest decisions made by individual officers are not so potent a means of suppressing speech. An officer has probable cause to arrest only on the basis of facts "known to the arresting officer at the time of the arrest." *Devenpeck*, 543 U.S. at 152. This limitation makes it difficult for an individual officer to carry out a premeditated plan to target speech that he does not like. There is little danger that an officer will spend time and energy trailing a person whose speech he dislikes in hopes of catching him doing something that creates probable cause to arrest. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 352 (2001) ("[I]t is in the interest of the police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason.").

Nor is there great danger that individual officers can use arrests supported by probable cause to thwart the essential goal of the first Amendment: "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Sullivan*, 376 U.S. at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). The typical retaliatory arrest claim alleges that an officer reacted against speech the suspect made at or near the scene of the arrest. Often the speech in question involves challenges to the officers' authority or simply personal insults. *See, e.g., White*, 503 F. App'x at 555 (basis for retaliatory arrest claim was the suspect's repeated cursing at officers and rhetorical complaint, "Why are you always f—king with me?"); *Morgan*, 2016 WL 1254222, at *19 (basis for retaliatory arrest claim was

the suspect's "loudly challenging officers' directions" to pack up her belongings and vacate a property in compliance with a court order); *Engman v. City of Ontario*, No. ECDV 10-284 CAS (PLAx), 2011 WL 13134048, *1-2 (C.D. Cal. May 23, 2011) (basis for retaliatory arrest claim was the suspect's statement to police that "even [his] father could kick their asses"). To be sure, this kind of "verbal criticism and challenge directed at police officers" is protected by the First Amendment, *City of Houston v. Hill*, 482 U.S. 451, 461 (1987), but it is neither speech on matters of public concern that "occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection," *Connick v. Myers*, 461 U.S. 138, 145 (1983), nor a petition for the redress of grievances that occupies a similarly lofty place, *Lozman*, 138 S. Ct. at 1955; *cf. Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387 (2011) ("[T]he Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for the resolution of legal disputes."). An individual officer's on-the-spot reaction to a personal insult or challenge to his authority is thus unlikely to undermine the free exchange of ideas or "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means." *Sullivan*, 376 U.S. at 269 (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

Second, § 1983 liability is not the only way to deter officers from making retaliatory arrests. Whereas "[a]n official policy . . . can be difficult to dislodge" because it is the decision of those in charge, the improper actions of an individual police officer can be effectively

addressed through internal investigation and discipline. *Lozman*, 138 S. Ct. at 1954 ("A citizen who suffers retaliation by an individual officer can seek to have the officer disciplined or removed from service . . . ."). With the proliferation of smartphones that can record what happens in an arrest, citizens can alert police departments about arrests clearly motivated by retaliatory animus. It is in law enforcement's own interest to address such complaints as they arise and to demonstrate accountability to the public. *Atwater*, 532 U.S. at 353 (noting that "the good sense (and, failing that, political accountability) of most local lawmakers and law-enforcement officials" contributes to "a dearth of horribles demanding redress"). Police departments know that responsiveness to citizen complaints increases trust in law enforcement and is "the key to effective policing." Int'l Ass'l of Chiefs of Police, *Building Trust Between the Police and the Citizens They Serve* 5-7, https://ric-zai-inc.com/Publications/cops-p170-pub.pdf.

And if retaliatory animus among a jurisdiction's police officers proves severe and intractable, damages may be available regardless of probable cause. Should legitimate complaints go unaddressed, or should individual arrests motived by retaliatory animus become a "pervasive" problem in a police force, a plaintiff may obtain relief against a municipality under § 1983 by alleging an official custom or practice of retaliation against disfavored speakers. *Lozman*, 138 S. Ct. at 1954 (citing *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 691 (1978)). A municipality may be liable under § 1983 based on "governmental 'custom' even though such a custom has not received formal approval through the body's official

decisionmaking channels," *Monell*, 436 U.S. at 691, for example based on a pattern of retaliatory arrests in which senior policymakers acquiesce. *See, e.g., Sorlucco v. New York City Police Dep't*, 971 F.2d 864, 871 (2d Cir. 1992) ("[A] § 1983 plaintiff may establish a municipality's liability by demonstrating that the actions of subordinate officers are sufficiently widespread to constitute the constructive acquiescence of senior policymakers."). Under *Lozman*, probable cause does not bar such claims, allowing relief for "troubling and potent" types of retaliation—the sort that may not be effectively addressed through internal or external oversight mechanisms.

But for retaliation claims arising out of the "mine run of arrests," *Lozman*, 138 S. Ct. at 1934, a probable cause element that permits recovery for the arrests most likely caused by retaliatory animus while filtering out those that are not sufficiently protects the values of the First Amendment.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted.

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